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No. 01-690

In The Supreme Court Of The United States

MARGARET A. BAGLEY, Warden,

Petitioner,

v.

JOHN W. BYRD, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY*
State Solicitor
**Counsel of Record*
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

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The State of Ohio seeks review of an en banc Sixth Circuit order directing a magistrate judge to hold a factual hearing into a death-row inmate's claim of innocence. That state prisoner has raised that new claim some eighteen years after he was tried and sentenced, and twelve years after he first secured the evidence that supposedly supports his claim of innocence. According to the en banc court of appeals, AEDPA's "due diligence" requirement – which directs state prisoners to raise their federal habeas claims at the first available opportunity – does not bar this prisoner from raising his claim of innocence now in a second habeas petition, even though the prisoner intentionally withheld that claim and any supporting evidence from both state and federal courts for many years.

In the wake of the en banc court's order, the parties have spent a week presenting witness testimony and documentary evidence to a magistrate judge, and now the case has bounced back to the court of appeals for still more briefing and further proceedings there. An issue that should have been open-and-shut in light of 28 U.S.C. 2244(b)(2)(B)'s "due diligence" requirement continues to tie up the federal courts, further delaying a long-delayed execution and turning on its head the notion embodied in AEDPA that prisoners should not be rewarded for withholding claims from their first federal habeas petitions.

Respondent Byrd suggests in his brief in opposition that the issue is not an important one, and that the parties should just let the court of appeals continue to work on the case without limit. We write now simply to debunk that view, for the en banc court's order – now published at 269 F.3d 585, with the various other orders and opinions from our petition appendix now printed at 269 F.3d 544 and on the pages that follow – sets a troubling precedent for Sixth Circuit capital cases, no matter how the court of appeals handles the case from this point forward.

On each of the three questions raised in our petition for certiorari, the en banc court of appeals has strayed from the text of AEDPA and from the principles that underlie that provision. No matter how the court of appeals rules on the particular *factual* questions that the court has asked a magistrate judge to examine in this particular capital case, the critical concerns that we have raised in our petition for certiorari focus on the *legal* principles on which the en banc court's actions purport to rest. Given that AEDPA's text appears to bar a court of appeals from giving a state prisoner the opportunity to file a second federal habeas petition in cases like this, and given that the court of appeals has not

only vacated a panel's opinion denying relief to this prisoner but has also granted rehearing en banc and handed the case to a new judge, the case sets a troubling benchmark for capital cases in the Sixth Circuit.

Even if the court of appeals rules against this prisoner's latest request for habeas relief, prisoners now know that published authority exists in the Sixth Circuit encouraging them to hold back actual-innocence claims from their first federal habeas petitions. If this prisoner loses in the Sixth Circuit, it will be because the Sixth Circuit concludes that his claim of innocence is not well grounded in the facts of his particular case, but our concern is that he ought not be permitted to raise the claim of innocence at all at this point, given that he did not comply with AEDPA's due diligence requirement in raising that claim, as even he readily admits. And he certainly is not, under AEDPA, entitled to seek and secure a circuit court rehearing after a panel of the court of appeals first denies his request to file a second habeas petition, and he ought not be entitled to present his long-withheld claim of innocence at a week-long hearing before a new trial judge some twelve years after he first obtained the "evidence" that purports to support his claim.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY*
State Solicitor
**Counsel of Record*

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